Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CHARLES OWENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit Pattern Jury Instructions in Criminal Cases (1985) relative 26 U.S.C. §5861(d) in a short-barreled rifle prosecution satisfy the *mens rea* requirement of *Staples v. United States*, 511 U.S. 600 (1994), as required by the Due Process Clause?

2. Whether the United States Courts of Appeal are giving proper application to the decision of this Court in *Staples v. United States*, 511 U.S. 600 (1994), when an unaltered weapon is capable of configuration as both an unregulated weapon and a regulated firearm?

3. Whether 26 U.S.C. §5861(d) is unconstitutionally vague in its definition and notice of proscribed criminal conduct relative a manufactured carbine kit capable of a configuration both as a regulated and unregulated rifle under *United States v. Thompson/Center Arms Co.*, 504 U.S. ---, 112 S.Ct. 2102, 119 L.Ed.2d 308

(1992)?

4. Whether 26 U.S.C. §5861(d) may be constitutionally applied to a part-time shop employee who attaches a short rifled barrel to a receiver which he thinks is a pistol "just like the Thompson Contender"?

B. PARTIES INVOLVED

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 22 January 1997, rehearing denied 07 March 1997.

D. CITATIONS TO OPINIONS BELOW

The opinion below is reported *United States v. Owens*, 103 F.3d 953 (11th Cir. 1997). (Appendix, hereinafter "A," pp. 1-7).

E. JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on 22 January 1997. (A-1-7). A timely filed Petition for Rehearing was denied by the Court of Appeals on 07 March 1997. (A-8-9). The jurisdiction of the Supreme Court of United States is invoked pursuant to 28 U.S.C. §1254(1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

2. Statutory Provisions.

26 U.S.C. §5845(c) provides:

> The term "rifle" means a weapon designed or

redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C. §5861(d) provides:

It shall be unlawful for any person—

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

26 U.S.C. §5845. Definitions

For the purpose of this chapter—

(a) Firearm.

* * *

(3) a rifle having a barrel or barrels of less than 16 inches in length;

G. STATEMENT OF THE CASE

1. The Basis for Jurisdiction Below.

A federal criminal prosecution was initiated in the Northern District of Florida, Tallahassee Division, against Charles David Owens for an alleged violation of 26 U.S.C. §5861(d). The prosecution resulted in a conviction as charged on 19 May 1995.

On 08 August 1995, Mr. Owens was sentenced to 33 months imprisonment. On the same day he filed his Notice of Appeal and Motion for Bail Pending Appeal. Judge William Stafford, Senior Judge, granted release pending appeal.

Pursuant to 28 U.S.C. §1291, Mr. Owens prosecuted his appeal to the United States Court of Appeal for the Eleventh Circuit which affirmed on 22 January 1997. *United States v. Owens*, 103 F.3d 953 (11th Cir. 1997). (A-1-7). Petition for Rehearing was filed on 12 February 1997, and denied on 07 March 1997. (A-8-9).

2. Facts Pertinent to the Questions Presented.

On 05 October 1994, at approximately 2:30 p.m., Special Agent Donald Williams of the Bureau of Alcohol, Tobacco and Firearms with a group of agents as backup went to the Sports and Athletic Consignment Shop in Tallahassee, Florida, in an undercover capacity wearing a transmitter and a recording device. (R3-62). Acting on a "tip" that an unassembled short-barreled "firearm" present on a shelf in the store was being offered for sale, Special Agent Williams made an audio cassette of the conversation that he had with part-time sales clerk Charles David Owens and shop owner Howell Tony Williams. The transcript of the tape was introduced into evidence as Government's Exhibit 3C.

Agent Williams initiated contact with Mr. Owens, who initially was the only employee behind the counter, about a mini Uzi which the shop had offered for sale for $1,795.00. The price included six magazines, two barrels, extra trigger

grips, barrel shroud, extra set of grips, a sling, instruction manual, cleaning kit, cleaning tool, and a shoulder holster. (3C-1; 3C-5; 3C-8). One of the barrels was a manufactured 7-inch barrel, and the other a longer manufactured 19 3/4-inch barrel which Mr. Owens described as "the Carbine barrel." (3C-2).

Mr. Owens informed Special Agent Williams, "If you decide to buy it...make sure...that whoever is here classifies it as a pistol. Not a...rifle." (3C-5). Mr. Owens advised the agent that with the short barrel attached, it could not legally be carried as a rifle. But, if it were classified as a pistol[1] it would be lawful to carry, as long as the agent got a concealed pistol permit, and waited the mandatory three day waiting period pursuant to Florida law. (3C-70). Mr. Owens stated

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[1] The weapon was recorded on the receipt book of the Sports and Athletic Consignment Shop by the owner, Howell Tony Williams, as a pistol. (R3-164).

that the weapon could be classified either as a rifle or a pistol depending on which of the two barrels was attached. "You just took a pistol and put a longer barrel on it." "Just like the Thompson contender single shot rifles." (3C-10). "[I]t's just like the Thompson Contenders." (3C-16).

An unidentified customer who observed the transaction also "confirmed" on the tape that the gun would be illegal if classified as a rifle, and stated that a person would have to attach the longer barrel in order to classify the weapon as a rifle. With a shorter barrel, the weapon should be classified as a pistol.

Special Agent Williams then said, "I see, the barrel's got to be eighteen inches long."

Mr. Owens answered, "Right. If you classify it as a pistol... you can take this [short barrel] and carry it concealed, if you have the permit."

> MR. OWENS: Yea, if it's got the big [barrel] one on there, o.k., you can classify, you can

> have, you can classify it as a rifle. Since it has the shorter barrel, you classify it as a pistol. The serial number is classified as a pistol. You just took a pistol and put a longer barrel on it.
>
> * * *
>
> MR. OWENS: Just like the Thompson contender single shot rifles.

When the agent questioned Mr. Owens about possibly running afoul of the law with the different barrels, Mr. Owens assured him that "You bought it legally." (3C-9). Later, shop owner Howell T. Williams[2] came into the shop and engaged in the transaction with Mr. Owens and Agent Williams. Further discussions occurred among the three as to whether the gun was a pistol (like the Thompson Contender), or a rifle, and the consequences of each classification. Ultimately, it was decided, after checking the manufacturer's manual, to classify the weapon as a carbine. (3C-22). Agent Williams then excused himself saying he needed to get his

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[2] Howell Williams pled guilty of false record keeping and was convicted of a misdemeanor. (R2-2).

check book from his car; the arrest was then made.

3. Course of the Proceedings.

It was the government's position at trial that the unassembled receiver and barrel being on the top shelf under the counter qualified under the statute as possession of a regulated short-barreled rifle. (R3-114). The government also wanted language added to the pattern jury instructions used in the Eleventh Circuit (A-10-11) that because the rifle was disassembled it did not mean it could not be possessed. (R3-115). Trial counsel for the defendant relied on *Staples v. United States*, 511 U.S. 600 (1994), and argued to the contrary. (R3-116).

When the district court judge announced its rulings regarding the jury instructions, he stated that he had looked at *Staples* but had decided to instruct the jury as to the elements of the offense as follows:

> The defendant can be found guilty of this offense charged in this indictment only if the

> following facts are proved beyond a reasonable doubt, if all of the following facts are proved beyond a reasonable doubt (sic): First, that the defendant knowingly possessed a rifle having a barrel less than 16 inches in length; and second, that this short-barreled rifle was not then registered to the defendant in the National Firearms Registration and Transfer record. It is not necessary for the government to prove that the defendant knew that the item described in the indictment was a firearm that the law requires to be registered. What must be proved beyond a reasonable doubt is that the defendant knowingly possessed a rifle having a barrel less than 16 inches in length and that this rifle was not then registered to the defendant in the National Firearms Registration and Transfer records.

(R3-205-206). The jury instructions delivered at trial follow the *Eleventh Circuit Pattern Jury Instructions*, which are reprinted in the Appendix, (A-10).

The jury left the courtroom at 3:54 p.m., and at 5:20 p.m. returned a verdict of guilty as charged of possession of an unregistered short-barreled rifle. (R3-212).

The case was set for sentencing on 08 August 1995 at which time Mr. Owens was sentenced to 33 months in prison.

On the same date, undersigned counsel first appeared and filed a Notice of Appeal and a motion for bail pending review, which was granted.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Mr. Owens argued: (1) The district court committed reversible error when it did not instruct the jury on the knowledge state of mind element of the offense as requested by the defendant and required by the United States Supreme Court in *Staples v. United States*, (*infra*); (2) The prosecution under 26 U.S.C. §5861(d) for the offense of possession of an unregistered short-barreled rifle denied the defendant due process; (3) 26 U.S.C. §5861(d) is unconstitutional as applied to the facts of the case; and (4) As a part-time employee in a consignment sporting goods shop, Mr. Owens did not have a sufficient possessory interest in the firearm to be subject to regulation under the National Firearms Act.

The Eleventh Circuit, Judge Anderson, writing for Senior Judges Kravitch and Henderson, chose not to address Mr. Owens' argument that §5861(d) was ambiguous as applied to the facts of the case because Mr. Owens had, allegedly during the course of the transaction with the agent, assembled a firearm when he placed the shorter barrel on the receiver. (A-3). Mr. Owens' argument that *Staples* required an instruction to the jury that Mr. Owens must have knowledge of the characteristics of the weapon which brought the weapon under the proscription of 26 U.S.C. §5845 was expressedly addressed and rejected by the panel. (A-4). The Eleventh Circuit Pattern Instruction on 26 U.S.C. §5861(d) (A-10-11), which was delivered by the district court to the jury (A-4), was reconfirmed in the opinion with language which explicitly tracked, with approval, the pattern instruction language. In footnote (fn. 1), the Eleventh Circuit addressed and rejected the issue of Mr. Owens' transitory possession as

a part-time employee of a licensed sports consignment shop. (A-5). Similarly, in footnote (fn. 4) the Eleventh Circuit addressed, and rejected, the due process argument that 26 U.S.C. §5861(d) conflicted with 18 U.S.C. §922(b)(4). (A-6).

H. REASONS FOR GRANTING THE WRIT

1. The Eleventh Circuit Pattern Jury Instruction on 26 U.S.C. §5861(d) approved in the opinion below conflicts with the *mens rea* requirement announced in *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), which issue is likely to recur.

The instructions to the jury tracked the Eleventh Circuit's Pattern Jury Instructions in Criminal Cases. The Pattern Instructions are reproduced in the Appendix. (A-10-11). The pattern jury instructions adopted by the Eleventh Circuit in 1985 are legally insufficient under *Staples*. The error will be repeated in every prosecution under 26 U.S.C.

§5861(d) in Florida, Georgia, and Alabama until the *mens rea* element of the Pattern Jury Instructions is corrected by the Supreme Court. The current erroneous pattern instruction has already spawned litigation in the area under *Staples*. *See United States v. Rogers*, 94 F.3d 1519 (11th Cir. 1996). The errors raised in *Rogers* were addressed under a harmless error analysis, because the characteristics of the weapon obviously required registration.

Owens is different in quality and kind from *Rogers*. The defendant was working in a store, not on the street. The defendant was trying to explain how to comply with the law, not how to circumvent it. The defendant did not know the receiver was a rifle receiver while it was in his possession and never evidenced any knowledge of the characteristics of the receiver which required registration. The Eleventh Circuit pattern instruction given to the jury effectively took away from the jury any issue of innocent intent by failing to

adequately and accurately describe the requisite state of mind for a legitimate prosecution under 26 U.S.C. §5861(d). *United States v. Gaudin*, 115 S.Ct. 2310 (1995).

The Court should take jurisdiction of this case to explain that this line of offenses is not a strict liability crime. While knowledge of the law is not a defense, *Ratzlaf v. United States*, 510 U.S. 135, 137; 114 S.Ct. 655, 657 (1994), guilty knowledge is still an issue for the jury.

2. Decisions between federal courts of appeal conflict with decisions of other sister courts on the *Staples*[3] issue.

There is already disagreement among the circuits over how *Staples* applies to sawed-off weapons, *i.e.*, whether it requires that the defendant knew that the weapon was shorter than the prescribed length or merely that the defendant knew

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[3] *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

that it was sawed off.[4] *Compare, e.g., United States v. Edwards*, 90 F.3d 199, 203 (7th Cir. 1996) ("We begin by noting that the Circuits are split on whether the *mens rea* requirement set forth in *Staples* is applicable to sawed off shotguns."); *United States v. Mains*, 33 F.3d 1222, 1230 (10th Cir. 1994) (stating that the defendant must have knowledge of "the length of the barrel or the overall length of the gun" to be convicted under the Act) *with United States v. Barr*, 32 F.3d 1320, 1324 (8th Cir. 1994) (holding that a sawed-off shotgun is "quasi-suspect" and that, therefore, the Government need only prove that the defendant possessed the "quasi-suspect" weapon and observed its characteristics). In this case, the issue is whether §5861(d) requires a defendant know that the

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[4] In the *Owens*' prosecution, the facts dealt exclusively with a manufactured weapon which could be assembled into a firearm. The weapon and aggregation of parts were not "altered" or "sawed off."

characteristics of the receiver which made the weapon a rifle, not merely whether the overall length of the rifle was shorter than sixteen inches. *See United States v. Moore*, 97 F.3d 561 (D.C. Cir. 1996).

3. The *Thompson/Center Arms* issue presents a question of great public importance because 26 U.S.C. §5861(d) was given unwarranted construction by the Court of Appeals in order to save its constitutionality.

Mr. Owens, a part-time employee at a sporting goods consignment shop, was charged with possession of a manufactured, not an altered, short-barreled rifle which was on display in the store where he worked and had no proprietary interest. After demonstrating the firearms to an ATF agent, he was arrested. The firearm in question had been received into the shop as a "pistol" and was recorded on the books of the store by the owner as a pistol. (R3-164). Mr. Owens, in a transaction entirely captured on audio tape,

(Government's Exhibit 3C), referred to the gun consistently as a pistol if the shorter barrel were attached and as a rifle if the longer barrel were attached. Mr. Owens' obvious ignorance was not of the law, nor of the length of the barrel, but rather the characteristics of the receiver to which the barrel would be attached. The characteristics of the weapon which required firearm registration were the carbine (rifle) nature of the receiver, not merely the barrel length.

Yet, remarkably this innocent nonsecretive conduct on the floor of an open licensed business establishment in the presence of other customers has subjected Mr. Owens to thirty-three months in prison. The store owner, who admittedly falsely reported the nature of the weapon in the first place, was treated more lightly (a misdemeanor conviction). The receiver had no externally visible indication that it was a carbine (rifle) receiver as opposed to a pistol receiver. Mr. Owens' repeated assertions that the gun was

"just like the Thompson Contender" is evidence of his clean hands and his ignorance of the characteristics of which required the gun to be registered.

Congress never intended that a part-time store clerk handling a weapon which he stated on an undercover tape was a pistol "just like a Thompson Contender" should be subjected to 33 months imprisonment because unknown to the clerk, the receiver on the weapon was a rifle receiver, not a pistol receiver. This is the case where the "the line should be drawn in deciding what combinations of parts are 'made' into [or possessed as] short-barreled rifles," *United States v. Thompson/Center Arms Co.*, 504 U.S. ---, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992). The store clerk, in effect, relying on the ambiguity noted in *Thompson/Center* was subjected to criminal prosecution.

The Government prosecuted under the theory that the defendant[s] possessed the unassembled short-barreled rifle

merely by the simultaneous presence of the unassembled parts on the floor-room shelf of the sporting goods consignment store. (R3-2). In conversation with the undercover agent the defendant no less than three times referred to the fact that the short-barreled rifle was "just like the Thompson Contenders." [Government's Exhibits 3C-10, 3C-16, 3C-16 (sic)].

Mr. Owens argued in the Eleventh Circuit Court of Appeals that prosecution under 26 U.S.C. §5861(d) denied him due process because the case involved an arms length transaction over the counter with an unassembled aggregation of parts which could be innocently configured into an unregulated firearm or a regulated firearm depending on the intent of the party. It was Mr. Owens position that at all times his actions and words, which were contemporaneously recorded, evidenced no guilty knowledge and no guilty intent, because at all times when the weapon was in his possession, he erroneously thought the receiver bore the characteristics of

a pistol, ["just like the Thompson Contenders"]. Therefore, the controlling issue was not merely the length of the barrel intended to be placed on the receiver which triggered the registration requirements, but also the characteristics of the receiver. (*See Staples* issue above.) Mr. Owens argued to the Eleventh Circuit that the notion of "an unassembled machine gun is probably broader than that of an unassembled rifle, but just where the line is to be drawn on short-barreled rifles is not demonstrated by textual considerations." *United States v. Thompson/Center Arms Co., supra,* 112 S. Ct at 2109. Mr. Owens argued in the Eleventh Circuit that the statute was ambiguous. The Eleventh Circuit sidestepped the issue. (A-3).

As prophetically noted by Justice White in *Thompson/Center*:

> The Court today thus closes one loophole --- one cannot circumvent the NFA simply by offering an unassembled collection of parts --- only to open another of equal dimension ---

> one can circumvent the NFA by offering a collection of parts that can be made either into a "firearm" or an unregulated rifle.

The *Owens'* prosecution squarely places the issue before the Court in a criminal law context.

4. The Eleventh Circuit Court of Appeals announced an unwarranted construction of 26 U.S.C. §5861(d) as clearly Congress never intended that 26 U.S.C. §5861(d) be applied to the innocent conduct of a part-time sales clerk which occurred in this case.

26 U.S.C. §5861(d) was not intended to apply to the conduct which occurred in this case. The statute was designed to prosecute the underworld, those in the underhanded business of dealing instruments intended for death and destruction. The conduct here occurred on the showroom of a licensed sporting goods shop. The defendant was a part-time employee who had just started to work. The gun was being purchased as a Christmas gift for the customer/agent's

brother. The transaction was aboveboard; three unidentified customers were also captured on the audio tape. One gave (erroneous) advice as to whether the gun should be classified as a pistol or a rifle. (3C-5). The other two made unrelated conversation. (3C-12). Congress did not intend draconian sentences for these circumstances or this conduct.

The conduct engaged in below is sufficiently regulated by the administrative law process, and the fact that a knowledgeable special agent of the Bureau of Alcohol, Tobacco and Firearms has sufficient tactical skill to convince a part-time clerk, whose other part-time employment was as a private security guard for Globe Airport Security (R3-119), to demonstrate that the short barrel will fit onto the mini-Uzi receiver is not sufficient to trigger 26 U.S.C. §5861(d) where there is a lack of conscious intent that a crime be committed.

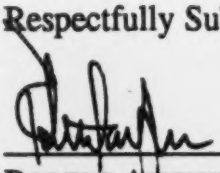
"Possession" in the context of 26 U.S.C. §5861(d) has two separate and distinct concepts, (a) knowledge of the

presence of a weapon and (b) knowledge of the characteristics of the weapon which require regulation. In a drug prosecution, the Government must prove the defendant knew the existence of the package and must prove the defendant knew, or had constructive knowledge, that the package contained a controlled substance. The Court in *Staples* stated that a defendant must know he has a weapon and must know the weapon has the characteristics of a fully automatic. In *Owens*, the defendant knew he had a weapon, but the Eleventh Circuit does not require that the defendant know the weapon had the characteristics which required it to be registered. The jury was not instructed properly and was not given proper latitude to evaluate innocent intent.

I. CONCLUSION

The petition for writ of certiorari should be granted, and that relief is respectfully requested.

Respectfully Submitted,



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APPENDIX TO
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TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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(To be reported at: 103 F.3d 953)
(Cite as: 1997 WL 4553 (11th Cir.(Fla.)))

UNITED STATES of America, Plaintiff-Appellee,
v.
Charles OWENS, Defendant-Appellant.

No. 95-3107.

United States Court of Appeals,
Eleventh Circuit.

Jan. 22, 1997.

Robert Augustus Harper, Tallahassee, FL, for Defendant-Appellant.

P. Michael Patterson, U.S. Atty., Audrey A. Butler, Asst. U.S. Atty., Tallahassee, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Florida.

Before ANDERSON, Circuit Judge, and HENDERSON and KRAVITCH, Senior Circuit Judges.

ANDERSON, Circuit Judge:

Defendant-appellant Charles David Owens was convicted by a jury for possession of an unregistered rifle with a seven-inch barrel in violation 26 U.S.C.A. §5861(d). On appeal, Owens contends the following: (1) that his due process rights were violated because 26 U.S.C.A. § 5861(d) is ambiguous; and, (2) that the district court committed reversible error in failing to instruct the jury that the government must prove that Owens

knew that the NFA required the short-barreled rifle in his possession to be registered. [FN1]

I. FACTS

At the time of his arrest, appellant was working part-time at the Sports and Athletic Consignment Shop. While at work on October 5, 1994, appellant waited on undercover Agent Donald Williams of the Bureau of Alcohol, Tobacco and Firearms (ATF). [FN2] Upon observing an Uzi mini-carbine on the second shelf of a glass case, Agent Williams asked Owens how it was operated, and what parts were included with it. Owens offered to sell to Agent Williams the following parts with the carbine: six magazines, two barrels (one seven inches, and one nineteen and three quarters inches), an extra trigger shroud, an extra trigger grip, a barrel shroud, a sling, an instruction manual, a cleaning kit, a cleaning tool and a shoulder holster. The two barrels which Owens offered to sell with the carbine also were on the second shelf of the glass case. Agent Williams testified that during the course of their discussion regarding the operation of the carbine, Owens placed the seven-inch barrel into the carbine. It is undisputed that the weapon was not registered. At trial, Owens denied putting the seven-inch barrel onto the carbine.

II. DISCUSSION

A. Whether appellant's conviction under 26 U.S.C.A. § 5861(d) denied him of due process.

Under the National Firearms Act (NFA), 26 U.S.C.A. § 5861(d) makes it unlawful for any person to "possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." The term "firearm" is defined in 26 U.S.C.A. § 5845(a)(3) as, inter alia, "a rifle having a barrel or barrels of

less than 16 inches in length." [FN3] A "rifle" is defined as:

> [A] weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

26 U.S.C.A. § 5845(c).

On appeal, appellant argues that he was denied due process guaranteed by the Fifth Amendment because the statute under which he was prosecuted, 26 U.S.C.A. § 5861(d), is ambiguous. [FN4] According to appellant, it is unclear whether § 5861(d) covers the mere possession of unassembled parts without being registered, when those parts can be assembled into either an illegal or legal weapon. In support of his contention, appellant relies upon the plurality opinion authored by Justice Souter in United States v. Thompson/Center Arms Co., 504 U.S. 505, 112 S.Ct. 2102, 119 L.Ed.2d 308 (1992) (Rehnquist, C.J., O'Connor, J., joining in the opinion). Although Thompson/Center arose in a somewhat different context, appellant contends that it supports his argument that § 5861(d) does not unambiguously prohibit the possession without registration of the unassembled parts involved in this case. We need not address this argument because the jury found that appellant Owens assembled the weapon with the seven-inch barrel, and as assembled it was clearly an unregistered rifle "having a barrel ... of less than 16 inches in length." 26 U.S.C.A. § 5845(a)(3). Thus, Owens possessed the weapon assembled with the seven-inch barrel. Because the statute, as applied to Owens, clearly was not vague, we need not consider whether the effect of the statute is uncertain with respect to other litigants. See United States v. Nat'l Dairy Products Corp., 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); United States v. Hicks,

980 F.2d 963 (5th Cir.1992), cert. denied, 507 U.S. 998, 113 S.Ct. 1618, 123 L.Ed.2d 178 (1993).

B. Whether the district court's jury instructions constituted reversible error.

Appellant contends that the district court's jury instructions amounted to reversible error. At the charge conferences, appellant had argued that Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994), requires the government to prove not only that the defendant knowingly possessed a rifle with a barrel of less than 16 inches, but also to prove that the defendant knew the firearm had to be registered under the NFA. The district court rejected appellant's interpretation of Staples and charged the jury as follows:

> The defendant can be found guilty of this offense charged in this indictment only if the following facts are proved beyond a reasonable doubt ...: First, that the defendant knowingly possessed a rifle having a barrel less than 16 inches in length; and second, that this short-barreled rifle was not then registered to the defendant in the National Firearms Registration and Transfer Record. It is not necessary for the government to prove that the defendant knew that the item described in the indictment was a firearm that the law requires to be registered.

We reject appellant's interpretation of Staples, and find no error in the district court's instructions. [FN5] Appellant reads Staples broader than its self-described "narrow" holding. Staples, 511 U.S. at ----, 114 S.Ct. at 1804. While Staples requires the government to prove a defendant's "[knowledge] of the features of [the weapon] that brought it within the scope of the Act," id., it does not require that the government prove that a defendant knew that the firearm in his or her possession had to

be registered under the Act. Id. at ---- - ----, 114 S.Ct. at 1798-99 (distinguishing Staples from United States v. Freed, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), which held that where a defendant knows the items he possessed had the features described in the statute (grenades there), the government need not prove that the defendant also knew they were unregistered); see also id. at ---- n. 3, 114 S.Ct. at 1806 n. 3 ("a defendant who knows he possesses a weapon with all of the characteristics that subject it to registration, but was unaware of the registration requirement ... may be convicted under § 5861(d)"); accord United States v. Mains, 33 F.3d 1222, 1229 (10th Cir.1994) (where the Tenth Circuit held that the district court's jury instructions which required that the defendant have "knowingly possessed a shotgun with a barrel length of less than 18 inches or an overall length less than 26 inches" were consistent with Staples, the court stated that the government was not required to prove that the defendant knew that such possession was illegal).

III. CONCLUSION

For the foregoing reasons, appellant's conviction is affirmed.

AFFIRMED.

FN1. Appellant also contends that the evidence regarding Owens' possessory interest in the firearm is insufficient to sustain his conviction. Specifically, he argues that he had merely transitory possession of a weapon. We need not in this opinion define the outer limits of conduct amounting to possession because Owens actually placed the seven-inch barrel in the carbine while selling it to the undercover Bureau of Alcohol, Tobacco and Firearms agent, Donald Williams. In light of the ample evidence of possession in this case, we readily conclude that appellant actually possessed the

firearm. See United States v. Pedro, 999 F.2d 497, 498 (11th Cir.1993); United States v. Bogden, 865 F.2d 124 (7th Cir.1988), cert. denied, 490 U.S. 1010, 109 S.Ct. 1652, 104 L.Ed.2d 166 (1989). Appellant's other arguments on appeal are also without merit and warrant no discussion.

FN2. The undercover investigation was initiated because the Bureau was notified by U.S. Customs Agent William Maxey, who is a federal firearms licensee, that a short-barreled Uzi carbine was in the consignment shop.

FN3. A rifle with a barrel of longer than 16 inches is not regulated by the NFA.

FN4. Appellant also argues that his due process rights were violated because there is an inherent conflict between 26 U.S.C.A. § 5861, which prohibits possession of an unregistered rifle with a barrel of less than 16 inches, and 18 U.S.C.A. § 922(b)(4), which prohibits "any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--to any person any ... short-barreled shotgun, ... except as specifically authorized by the Secretary consistent with public safety and necessity." Appellant's argument is foreclosed by our decision in United States v. Rivera, 58 F.3d 600 (11th Cir.1995). See also United States v. Ardoin, 19 F.3d 177 (5th Cir.), cert. denied, --- U.S. ----, 115 S.Ct. 327, 130 L.Ed.2d 287 (1994); United States v. Ridlehuber, 11 F.3d 516, 526 (5th Cir.1993); United States v. Ross, 9 F.3d 1182 (7th Cir.), vacated on other grounds, 40 F.3d 144 (7th Cir.1993); United States v. Jones, 976 F.2d 176 (4th Cir.1992), cert. denied, 508 U.S. 914, 113 S.Ct. 2351, 124 L.Ed.2d 260 (1993); United States v. Aiken, 974 F.2d 446, 448 (4th

Cir.1992).

FN5. This Court's decision in United States v. Rogers, 94 F.3d 1519 (11th Cir.1996), is distinguishable from this appeal. In Rogers, "the district court, over a defense objection, refused to inform the jury that the Government had the burden of showing Rogers 'knew th[e] items in question were firearms' under the Act" (i.e. the court did not tell the jury that the defendant had to know the weapon had the characteristics or features that brought it within the scope of the NFA). Id. at 1523.

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U.S. Court of Appeals
Eleventh Circuit
Mar -7 1997
Miguel J. Cortez
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3107

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES OWENS,
Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Florida

BEFORE: ANDERSON, Circuit Judge, and KRAVITCH and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant,

CHARLES OWENS is Denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III
United States Circuit Judge

PATTERN JURY INSTRUCTIONS

68.1

POSSESSION OF UNREGISTERED FIREARM

26 USC §5861(d)

(Note: Willfulness not an essential element.)

Title 26, United States Code, Section 5861(d), makes it a Federal crime or offense for anyone to possess certain kinds of firearms which are not registered to him in the National Firearms Registration and Transfer Record.

Title 26, United States Code, Section 5845, defines "firearm" as including _____

_____.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant possessed a "firearm," as defined above; and

Second: That the "firearm" was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered. What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that it was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

Annotations and Comments

26 USC §5861(d) provides:

> "It shall be unlawful for any person...to...possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record..."

[Note: For the definition of "firearm" within the context of this statute, see 26 USC §5845].

Maximum Penalty: Ten (10) years imprisonment and $10,000 fine. 26 USC §5871.

Supreme Court, U.S.
FILED
JUN 2 1997
CLERK

(2)

No. 96-1559

In the Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on the *mens rea* required for a violation of 26 U.S.C. 5861(d), which prohibits possession of an unregistered, short-barreled firearm.

2. Whether Section 5861(d) is unconstitutionally vague.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1559

CHARLES OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 103 F.3d 953.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1997. A petition for rehearing was denied on March 7, 1997. Pet. App. A8-A9. The petition for a writ of certiorari was filed on April 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of possessing an unregistered, short-

barreled firearm in violation of 26 U.S.C. 5861(d). The district court sentenced him to a term of 33 months' imprisonment, to be followed by three years of supervised release, and fined him $1,000.[1] The court of appeals affirmed. Pet. App. A1-A7.

1. Petitioner was a part-time employee at a gun store called the Sports and Athletic Consignment Shop in Tallahassee, Florida. Howell Williams, the owner of the business, had accepted an Uzi mini-carbine with a long barrel on consignment from Lee Minor. Minor later brought a short barrel to Howell Williams to fit the Uzi rifle, and told Howell Williams that the weapon needed to be registered with a Class III gun dealer. Gov't C.A. Br. 2.

On September 29, 1994, Bill Maxey, a United States Customs agent and a federal firearms licensee, went to Howell Williams's gun shop on his lunch hour to "just look around." Petitioner showed Maxey an Uzi mini-carbine with a short barrel, a longer barrel, a flash suppressor, and a carrying case. Maxey asked petitioner if the short barrel fit in the Uzi carbine, and petitioner placed the short barrel in the weapon. Howell Williams joined the two men while petitioner was putting other attachments on the weapon. Maxey was aware that a short-barreled rifle was required to be registered. He questioned Howell Williams and petitioner about registration requirements for the weapon. Howell Williams said the requirement was contingent on the manner in which the weapon was

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[1] Petitioner's co-defendant, Howell Williams, pleaded guilty to the misdemeanor of making a false entry in records required to be kept by a federally licensed firearms dealer in violation of 18 U.S.C. 922(m) and 924(a)(3). See Gov't C.A. Br. 1.

recorded on ATF Form 4473.[2] According to Howell Williams, if the weapon was recorded as a handgun, not a rifle, it would be legal to put the short barrel on it and use it. Petitioner agreed with Howell Williams. The next day, Maxey called ATF Special Agent Don Williams to report what had transpired at the gun shop. Gov't C.A. Br. 2-3.

On October 5, 1994, Don Williams went to the gun shop and posed as a customer interested in buying the Uzi mini-carbine. Don Williams wore a recording device and other agents were stationed outside the store. Petitioner, the only employee in the store at that time, showed the Uzi to Don Williams. Petitioner offered the weapon, along with six magazines, two barrels (a seven-inch barrel and a 19 3/4-inch barrel), and multiple accessories, for $1,795. Gov't C.A. Br. 3.

While selling the weapon to Don Williams, petitioner placed the seven-inch barrel in the carbine. During the conversation, petitioner advised Don Williams about how to circumvent the law by making sure that the Uzi was classified as a pistol, not a rifle, at the time of sale. Petitioner told Don Williams that, if classified as a pistol, the weapon could be carried concealed, with a permit. Petitioner assured Don Williams that the authorities could do nothing about his possession of the short-barreled carbine provided it had been classified as a pistol when sold. Petitioner also advised Don Williams that the weapon did not have to be registered with anyone. Gov't C.A. Br. 3-5.

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[2] ATF Form 4473 is completed when a weapon is sold in a gun shop. The form provides information to ATF about the purchaser and the type of weapon sold. Gov't C.A. Br. 3 n.1.

Howell Williams came into the store as the purchase of the weapon was being completed. Don Williams asked him about the short barrel. Howell Williams said that he was not sure about it, and would have to refer to the Uzi manual. The manual stated that the weapon was a mini Uzi automatic carbine. Howell Williams said that he would let the "feds" argue about it, and instructed Don Williams not to put the short barrel on the rifle while in the store. Howell Williams knew that a carbine is a rifle, and that the short barrel should not accompany the gun unless it was registered. Gov't C.A. Br. 5.

2. At the charging conference held after the government presented its case, petitioner requested, in reliance on *Staples* v. *United States*, 511 U.S. 600 (1994), that the jury be instructed that, in order to convict him of a violation of 26 U.S.C. 5861(d), it had to find that he knew that the weapon was required to be registered under the National Firearms Act (NFA). After a review of *Staples*, the district court rejected the instruction. It concluded instead that the jury was required to find only that petitioner knew the characteristics of the weapon that made it subject to registration. Gov't C.A. Br. 8.[3]

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[3] In pertinent part, the district court instructed the jury as follows:

> The defendant can be found guilty of this offense charged in this indictment only if the following facts are proved beyond a reasonable doubt * * *: First, that the defendant knowingly possessed a rifle having a barrel less than 16 inches in length; and second, that this short-barreled rifle was not then registered to the defendant in the National Firearms Registration and Transfer Record. It is not necessary for the government to prove that the defendant knew that the

3. Petitioner testified in his own defense. He denied showing the weapon to Maxey, attempted to establish an alibi with records from another place of employment, claimed that he had not been fully trained by the gun shop, suggested that he knew little about firearms, denied attaching the seven-inch barrel to the carbine, and stated that he was merely a "volunteer" at the gun shop, without liability for what happened there. Gov't C.A. Br. 5-6.

4. The court of appeals affirmed. Pet. App. A1-A7. Noting that the jury had found that petitioner "assembled the weapon with the seven-inch barrel, and as assembled it was clearly an unregistered rifle 'having a barrel * * * of less than 16 inches in length,'" the court rejected petitioner's claim that the statute he was charged with violating was unconstitutionally vague as applied to him. Pet. App. A3 (quoting 26 U.S.C. 5845(a)(3)). The court of appeals further observed that, because the statute was not vague as applied to petitioner, it had no occasion to consider whether the statute would be vague if applied to other defendants. *Ibid.*

The court of appeals also rejected petitioner's claim that the district court erred in declining to instruct the jury that the government had to prove not only that petitioner knowingly possessed a rifle with a barrel of less than 16 inches, but also that petitioner knew that the firearm had to be registered under the NFA. Pet. App. A4-A5. The court reasoned (*ibid.*) that, although *Staples* requires the government to

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item described in the indictment was a firearm that the law requires to be registered.

Pet. App. A4. That instruction followed the Eleventh Circuit Pattern Jury Instructions. See *id.* at A10.

prove that a defendant knew the features of a firearm that brought it within the NFA's registration requirements, that case does not require the government to prove that the defendant was aware that the firearm had to be registered.[4]

ARGUMENT

1. Petitioner contends (Pet. 13-15) that the Eleventh Circuit's pattern jury instruction on the elements of a violation of 26 U.S.C. 5861(d), which the district court followed here, fails to convey the *mens rea* requirement announced in *Staples* v. *United States*, 511 U.S. 600 (1994). The courts below properly rejected that argument.

The "narrow" holding of *Staples* requires the government to prove a defendant's "[knowledge] of the features of [the weapon] that brought it within the scope of the [NFA]." 511 U.S. at 619. It does not require the government to prove that the defendant knew that the firearm he possessed was required to be registered under the Act. See *id.* at 608-610; see also *id.* at 622 n.3 (Ginsburg, J., concurring in the judgment) ("a defendant who knows he possesses a weapon with all of the characteristics that subject it to registration, but was unaware of the registration requirement, * * * may be convicted under § 5861(d)"); *United States* v. *Freed*, 401 U.S. 601, 607 (1971) (Section 5861(d) does not require government to prove that defendant knew grenades in his possession were unregistered); accord *United States* v.

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[4] Petitioner had also argued (Pet. C.A. Br. 41-43) that the evidence was insufficient to show possession of the weapon. The court of appeals found the evidence of possession "ample," and rejected petitioner's other arguments on appeal with little or no discussion. Pet. App. A5-A7 nn.1, 4-5.

Edwards, 90 F.3d 199, 202 & n.3 (7th Cir. 1996) (*Staples* requires gun owners "to be aware of the particular characteristics that bring their firearm within the statutory definition"; once such knowledge "is proven, the holding of *Freed* would suggest that strict liability kicks in with respect to registration"); *United States* v. *Mains*, 33 F.3d 1222, 1229 (10th Cir. 1994) (jury instruction requiring defendant to have "knowingly possessed a shotgun with a barrel length of less than 18 inches or an overall length less than 26 inches" is consistent with *Staples*; government is not required to prove defendant knew that such possession was prohibited under NFA). Accordingly, as the court of appeals correctly held (Pet. App. A4-A5), the district court did not err in the instruction it gave the jury as to the *mens rea* required for a violation of Section 5861(d).[5]

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[5] Petitioner notes (Pet. 14) that the Eleventh Circuit has also addressed the instruction required under *Staples* in *United States* v. *Rogers*, 94 F.3d 1519 (1996). On May 27, 1997, this Court granted certiorari in *Rogers*, limited to the question whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element. *Rogers* v. *United States*, No. 96-1279. Because the court of appeals in this case held that there was no instructional error, the harmless-error issue the Court will review in *Rogers* is not presented here. Moreover, the court of appeals in this case distinguished *Rogers* on the ground that the jury in that case was not told that "the defendant had to know the weapon had the characteristics or features that brought it within the scope of the NFA." Pet. App. A7 n.5. In any event, any conflict between *Rogers* and the decision in this case would be a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioner suggests (Pet. 15-17) as a basis for review that the courts of appeals are in conflict over whether *Staples' mens rea* requirement applies to prosecutions under Section 5861(d) for possession of sawed-off shotguns. Compare *Edwards*, 90 F.3d at 204 (government required to prove defendant knew sawed-off shotgun barrel was shorter than 18 inches) and *Mains*, 33 F.3d at 1229-1230 (jury required to find defendant knew sawed-off shotgun was less than 26 inches long or its barrel was shorter than 18 inches) with *United States* v. *Barr*, 32 F.3d 1320, 1324 (8th Cir. 1994) (because sawed-off shotgun "is clearly not a traditionally lawful weapon," defendant "had no legitimate expectation that the weapon was not subject to regulation," and *Staples* did not require government to prove "defendant knew of the specific characteristics which make the weapon subject to the [NFA]"); see also *United States* v. *Moore*, 97 F.3d 561, 564 (D.C. Cir. 1996) (recognizing disagreement among courts of appeals in application of *Staples* to possession of sawed-off shotguns). This case, however, does not involve that conflict because petitioner was convicted of possessing an unregistered short-barreled rifle, not a sawed-off shotgun. In any event, petitioner would not stand to benefit from review of that claim because the court of appeals held that *Staples* applied to this case and that the jury was instructed to find and did find that petitioner knowingly possessed a rifle with characteristics that made it subject to regulation. Pet. App. A3-A4.[6]

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[6] As noted above, in cases involving sawed-off shotguns, some courts of appeals would not require that the jury be instructed to make such a finding. The Department of Justice, however, has instructed prosecutors that, in all prosecutions

2. Petitioner also argues (Pet. 17-22) that, because he did not know that the Uzi mini-carbine had the characteristics of a rifle instead of a pistol, his conduct was not criminal, and that, because Section 5861(d) is ambiguous, it cannot be constitutionally applied to him. The court of appeals correctly rejected those claims.

The NFA makes it unlawful for any person to "possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. 5861(d). In pertinent part, 26 U.S.C. 5845 defines a "firearm" as "a rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3). A "rifle" is defined in 26 U.S.C. 5845(c) as

> a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

Petitioner's claim fails because the evidence showed and, by its guilty verdict, the jury found that petitioner possessed the weapon with a seven-inch barrel. As thus assembled, the weapon was an unregistered rifle "having a barrel * * * of less than 16 inches in length." Because petitioner possessed such

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under Section 5861(d), the government must prove that the defendant knew the features of the firearm that brought it within the scope of the statute and that the defendant is entitled to an instruction to that effect.

a weapon, the NFA was not unconstitutionally ambiguous as applied to him, and potential ambiguities in the NFA's application to other litigants is irrelevant. See, *e.g.*, *Chapman* v. *United States*, 500 U.S. 453, 467 (1991); *United States* v. *Powell*, 423 U.S. 87, 92 (1975).

In support of his argument that Section 5861(d) is so ambiguous that it cannot be constitutionally applied to him, petitioner relies (*e.g.*, Pet. 21) on the plurality opinion in *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992). That case, however, is inapposite. Applying the rule of lenity, the plurality in *Thompson/Center Arms Co.* concluded (*id.* at 507, 517-518) that the mere packaging of a pistol with a carbine kit containing a rifle stock that permitted the conversion of the pistol into a short-barreled rifle did not create a short-barreled rifle that is regulated under the NFA. Because the present case involves not the mere packaging of disassembled firearm parts, but rather an assembled short-barreled rifle, the finding of ambiguity in *Thompson/Center Arms Co.* has no application to this case.

Finally, in a variation of his claim that there was insufficient evidence to support his conviction, petitioner contends (Pet. 22-24) that Congress intended that Section 5861(d) be applied to "the underworld, those in the underhanded business of dealing instruments intended for death and destruction," not the "innocent conduct of a part-time sales clerk" in a gun shop. That claim should also be rejected.

As with the Racketeer Influenced and Corrupt Organizations Act (RICO), which is aimed at organized crime but reaches all who fall within the statutory requirements, the scope of Section 5861(d) is not limited to the specific class of criminals that prompted its enactment. See *Sedima, S.P.R.L.* v. *Imrex Co.*,

473 U.S. 479, 497-500 (1985) (civil RICO reaches respected and legitimate businesses as well as mobsters and organized criminals); *United States* v. *Turkette*, 452 U.S. 576, 588-593 (1981) (RICO's broad definition of "enterprise" includes criminal enterprises as well as legitimate businesses that might be infiltrated by organized crime). The record in this case contains ample evidence from which a reasonable jury could conclude that petitioner knowingly possessed a rifle with a barrel less than 16 inches long, and Section 5861(d) requires no more. Moreover, regardless of petitioner's personal characteristics, prosecution of persons illegally possessing short-barreled firearms is relevant to preventing the harm that could result from the sale or transfer of such weapons to persons petitioner describes (Pet. 22) as "the underworld, those in the underhanded business of dealing instruments intended for death and destruction."[7]

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[7] Petitioner also notes (Pet. 18) that his co-defendant, Howell Williams, who pleaded guilty to keeping false records, received more lenient treatment. The disposition of charges against Howell Williams has no relevance to petitioner's claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

JUNE 1997